

NO. X03-CV11-6032094S	:	SUPERIOR COURT
JAMES J. DESALLE, ET AL	:	COMPLEX LITIGATION
		DOCKET
VS.	:	AT HARTFORD
WAL-MART STORES, INC., ET AL	:	October 14, 2016

MEMORANDUM OF DECISION ON
MOTION TO REARGUE

The defendant seeks reargument of the court's decisions denying its motion for summary judgment (444.0) and overruling its objection to plaintiff's request for leave to amend (217.0). The court has thoroughly reconsidered its prior rulings but finds no reason to disturb either of them.

A. The Request for Leave To Amend. Plaintiffs filed this request to amend their complaint while the summary judgment motion was pending. This court has already explained at length why this filing was proper. Defendant has nonetheless renewed its argument that the allegations set forth in this amended complaint do not "relate back" to plaintiffs' original factual allegations.

In the court's ruling on the objection to the amended complaint (217.86), this court found that the common facts were "Wal-Mart's removal and replacement of the subject Cooper tire." The defendant argues that this cannot be an appropriate basis upon which to permit the amended complaint because Wal-Mart never removed the subject tire from the plaintiffs' vehicle. The court previously found, and still believes, that the facts about exactly what Wal-Mart did – and did not do – regarding the tire in question have hardly been proven at this point, and this includes whether or not the subject tire was removed at any point while Wal-Mart was

servicing plaintiffs' car on the date in question. To make things easier to follow in the future, for everyone, the court will file an addendum to Order 217.86 to state that the common nucleus of operative fact which the court found as the basis for permitting the amended complaint was "the services performed by Wal-Mart on the subject vehicle on the date in question or services which Wal-Mart should have performed but did not do so."

Defense counsel, in their new opposition to the amended complaint, rely heavily on the Appellate Court's recent decision in *DiMiceli v. Cheshire*, 162 Conn. 216 (2016), which contains a discussion of when a proposed amendment relates back to the original complaint. This reliance is misplaced.

In *DiMiceli*, the minor plaintiff claimed he was injured in a fall from an allegedly defective seesaw in a town park. The original complaint sounded only in negligence. After defense counsel moved for summary judgment based on the Town's claimed governmental immunity, plaintiffs obtained permission to file an amended complaint, which added an additional count in which they claimed that the seesaw was a public nuisance.

The nuisance count was added more than four years after the date of injury. Thereafter, defendant filed a new motion for summary judgment directed at the entire amended complaint. The trial court granted the motion. On appeal, the appellate court affirmed the trial court's holding that the nuisance count did not relate back to the original negligence complaint.

It is well settled in Connecticut that plaintiffs seeking to recover against municipalities on claims of public nuisance must plead and prove that the nuisance was created by one or more affirmative acts. In *DiMiceli* these acts did not relate back to the negligence claims, because "common usage does not equate a failure to act with an act." *Id.*, at 235.

Another important element of the relation back doctrine is that the original complaint must “notify the defendant that the claims based on its subsequently-alleged conduct were imminent.” *Id.* In this case, the original complaint and every amended complaint filed thereafter included specific allegations of negligence against Wal-Mart as part of plaintiffs’ claims against it under the CPLA. If plaintiffs were to convince a jury that Wal-Mart was a product seller for purposes of this case, it would have to defend a negligence claim which would not be significantly different than the negligence allegations in the CPLA count.

B. The Motion for Summary Judgment

Much of defendant’s attack on the court’s denial of its motion for summary judgment is based on the court’s allegedly improper statement that it would be “demonstrably unfair” not to allow the plaintiff to plead in the alternative.

It is obvious that the jury in this case may find that Wal-Mart was, based on the evidence it hears, a “product seller,” or it might find, from the evidence presented, that it was not. If Wal-Mart is found not to be a “product seller” there is also evidence from which a jury could reasonably and legally conclude that through its employees, it was still negligent in how it inspected or otherwise dealt with the subject tire. This is undoubtedly why plaintiffs amended their complaint to include a common law negligence count which is not subject to the CPLA. This is why the court said it would not be fair if it did not, under the circumstances, allow plaintiff to plead negligence in the alternative. The court takes strong exception to the following language set forth in the motion to reargue:

Instead of considering whether the allegations contain critically different causes of action and facts, the Court focused on fairness, which is not an appropriate consideration. There is no case law that supports the Court’s ruling that an untimely proposed amended complaint may relate back to the original complaint if it would be unfair because the case may get thrown out on summary judgment without the amendment.

Defense counsel makes too much of the court's use of the term "fairness." To begin with, as much as she may take issue with it, the court has found that the changes in the last amended complaint do relate back to the original complaint. The court has stated that it is obviously not clear that a jury will find that Wal-Mart was a "product seller" in the context of this case and has also observed that the claims of common law negligence set forth in the second count of the complaint represent a legitimate means by which the plaintiffs may proceed in the alternative. By stating that it would, under these circumstances, not be proper, or "fair," to allow an otherwise proper amendment to stand, the court was hardly announcing a new ground for denying summary judgment motions. A reading of this court's decisions on the proposed amendment and on the summary judgment motion cannot reasonably be misinterpreted to support the defense's contention that this court permitted the amendment so that the case "would not get thrown out on summary judgment."

For the foregoing reasons, the motion for reconsideration is denied. It is so ordered.

/s/ Miller, J. _____,